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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

COMPCO CORPORATION, *Petitioner,*

vs.

DAY-BRITE LIGHTING, INC., *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No.

COMPCO CORPORATION,

Petitioner,

vs.

DAY-BRITE LIGHTING, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Compco Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled cause on December 14, 1962, which was denied rehearing on January 18, 1963.

OPINION BELOW

The opinion of the Court of Appeals is reported at 311 Fed. 2d 26, and is reprinted as the Appendix, along with the judgment and denial of petitioner's petition for rehearing.

JURISDICTION

This Court's jurisdiction is founded under 28 U.S.C. 1254(1).

This petition is presented within ninety days from January 18, 1963, which is the date of the Court of Appeals decision denying rehearing of its original decision of December 14, 1962.

QUESTION PRESENTED

Is the freedom from confusion required by the Illinois law of unfair competition more important than the freedom of competition required by the United States patent and anti-trust laws so as to justify enjoining the selling, in properly marked containers, of the precise light fixtures of an invalid design patent?

STATUTES INVOLVED

The statutes involved include the pertinent sections of the Patent Act of 1952, Title 35 U.S.C., Sections 171 and 281; and 28 U.S.C., Section 1338:

35 U.S.C. 171:

> Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor. . . .

35 U.S.C. 281:

> A patentee shall have remedy by civil action for infringement of his patent.

28 U.S.C. 1338:

> (a) The district courts shall have original jurisdiction of any civil action arising under any act of Congress relating to patents. . . .
>
> (b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws.

STATEMENT

Respondent Day-Brite Lighting, Inc. started marketing a fluorescent light fixture designated CFI-10 in October, 1954. These fixtures are intended for ceiling installation and are 48" long, being made up of a housing and a reflector for the long lighting tubes. The fixture is sold as a unit, complete for installation, not in component parts.

The CFI-10 had a reflector of the "uplight" type, the reflector having elongated slots so that the light from the tube could be directed upwardly against the ceiling as well as downwardly. This eliminated shadows and unlighted areas. This particular type of fixture became popular in the early 1950's and was marketed by a number of companies.

The respondent's reflector differed from those being marketed as part of fixtures in 1954 by having slightly longer reinforcing ribs to prevent the reflector from warping.

Early in 1955, the petitioner's predecessor, Mitchell Lighting Division of Cory Manufacturing Company, started marketing a fixture having a similar reflector. A design patent was granted to respondent on December 13, 1955, and immediately thereafter a written notice of infringement was sent to Cory Manufacturing Company. Another notice of infringement was sent to petitioner on March 30, 1956.

Thereafter, two of respondent's other competitors entered into consent judgments holding the patent valid

and infringed, while a number of other competitors discontinued manufacturing after notice of infringement.

Respondent filed a complaint on July 14, 1958 alleging (1) infringement of the design patent under Title 35 U.S.C. 281 and (2) unfair competition under Title 28 U.S.C. 1338. The trial court held the design patent invalid.

The only activity of petitioner considered illegal was just the sale of fixtures incorporating the now-unpatented reflectors, there being no holding of "passing off"—the Court of Appeals stating that the defendant's products are "always shipped in clearly-marked containers". In its opinion, the Court of Appeal held that only the Illinois interest in "freedom from confusion" was involved here, and notwithstanding the invalidity of the design patent which literally covered petitioner's construction, there was enjoinable unfair competition. The holding of the District Court granting an injunction *in perpetuo* against sale or attempted sale of reflectors identical with or confusingly similar to the CFI-10, was affirmed, along with an accounting for damages resulting from the unfair competition.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has decided an important federal question which has not been, but should be, settled by this Court. The question involves the exclusive application of the federal anti-trust and patent laws to a situation where a seller has first elected to acquire a federal cause of action, thereby rejecting his common law right of action, and thereafter has enforced this federal right against competitors. Then, when the federal cause of action disappears because the patent is held invalid, is it proper for the seller to turn to the here-

tofore rejected common law right based on unfair competition?

This Court has not ruled on the question of whether an act that would be infringement of a design patent, if valid, can, just by itself, also constitute unfair competition. Here, a distinction is set up between a design patent and a mechanical patent. A design patent is granted only on the ornamental, i.e., identifying, nonfunctional features of a product—those same features which are relied upon in an action for unfair competition based upon confusion of the public. It will be seen that, in electing design patent coverage, respondent obtained shorter but surer coverage than that available through the doctrine of unfair competition.

Once having made this election and having enforced the patent, respondent cannot wipe the slate clean and ask for relief, under the guise of unfair competition, for an act that would constitute only design patent infringement. Just how the joinder of these actions arose is not clear, but it is clear that it has no sanction either in the statutory law or the decisions of this Court, the last design patent case decided by this Court being *Smith* v. *Whitman Saddle Co.*, 148 U.S. 672 (1892).

2. The decision in this case is in conflict with the applicable decisions of this Court, as derived from considerations of the anti-trust and patent laws. The anti-trust laws condemn a monopoly such as granted here, save only as it is within the protection of a lawfully granted patent monopoly. *Sola Electric Company* v. *Jefferson Electric Company*, 317 U.S. 173 (1942). Holding otherwise frustrates the basic purpose of the anti-trust laws.

> "The general objective of the anti-trust laws is the promotion of competition in the open markets." Report of the Attorney-General's National Committee to Study the Anti-Trust Laws, March 31, 1955, page 1.

The anti-trust laws condemn monopolies, and the only monopoly standing by itself (without attendant questionable behavior) which is free of challenge, is a patent. This stems from the fact that patents spring from the Constitution (Article I, Section 8, clause 8), and only because of this are exempt from the all-pervasive inquiry of the anti-trust laws. Chief Justice Hughes remarked that the Sherman Anti-Trust Act:

> "As a charter of freedom . . . has a generality and adaptability comparable to that found to be desirable in Constitutional provisions." *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 359 (1933).

The exception to the anti-trust inquiry is justified, since the monopoly is limited in time and limited in scope. Neither is the case here, since the injunction is in perpetuity and covers reflectors "identical to or confusingly similar to plaintiff's reflector."

The decisions of this Court on patents hold that, upon expiration of a patent, the subject matter is free to the public to use. In *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111 (1938), the design patent on the shredded wheat biscuit was held invalid, this Court saying at pp. 119-120:

> "Upon expiration of the patents, the form as well as the name was dedicated to the public. . . . The Kellogg Company was free to use the pillow-shaped form, subject only to the obligation to identify its product lest it be mistaken for that of plaintiff."

Later, this Court went even further in defining the rights accruing to the public upon expiration of a patent, saying in *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U.S. 249, 256 (1945):

> "By force of the patent laws, not only is the invention of a patent dedicated to the public upon its expiration, but the public thereby becomes entitled to share in the good will which the patentee has built up in the patented article or product through the enjoyment of his patent monopoly. Here, we have held that the patentee may not exclude the public from participating in that good will or secure, to any extent, a continuation of his monopoly. . . ."

The justification for this exclusion is clear. Either the patentee has benefited from his patent in driving others from the field, as here, or has benefited from the deterrent to others to enter the field because of the patent. Respondent, throughout the trial and appeal of this case, relied heavily on the respect accorded the patent, introducing as evidence the consent decrees and documents relative to competitors leaving the field because of the threat of patent litigation.

The decision of the Court of Appeals held that the Illinois interest in "freedom from confusion" was controlling, ignored the clear-cut statement of this Court in *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U.S. 249, 256 (1945):

> "The nature and extent of the legal consequences of the expiration of a patent are federal questions, the answers to which are to be derived from the patent law and the policies which they adopt."

To the federal law and policy, conflicting state law and policy must yield. Constitution, Article VII, clause 2; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 171,

176 (1943). Also, the Illinois law has nothing to do with design patents, this being reserved to the federal courts.

The holding that only the freedom from confusion is to be considered in an unfair competition action on the sale of a product covered by an expired design patent, affects every segment of the economy.

a. The Judiciary now has to decide whether anyone is likely to be confused rather than employing the objective test of whether invention is present in a patented structure.

b. The Bar now has to investigate the marketing practices of a patentee to determine whether liability will result rather than looking to the patent and prior art.

c. A competitor of the patentee cannot now challenge the validity of a patent by marketing the identical structure covered, notwithstanding careful identification so that there is no passing off.

d. The public in general is deprived of competition which tends to drive the price down while maintaining the quality high.

3. The decision in this case has become the established law in the Seventh Circuit, being followed in a later case decided by the Court of Appeals, *Stiffel Co.* v. *Sears, Roebuck & Co.*, ... F.2d. ...., 136 U.S.P.Q. 292 (1963). This rule is in conflict with the decisions of the other Circuits.[1]

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[1] Lucien Lelong, Inc. v. Lander Co., Inc., 164 F. 2d 395 (CA 2, 1947); West Point Mfg. Co. v. Detroit Stamping Co., 222 F. 2d 581 (CA 6, 1955); Daniel v. Electric Hose and Rubber Co., 231 Fed. 827 (CA 3, 1916); Goodyear Tire and Rubber Co. v. Robertson, 18 F. 2d 639 (D. Md., 1927), aff'd 25 F. 2d 833 (CA 4, 1928); Lenox v. Jones, McDuffee and Stratton, 271 Fed. 511 (D. Mass., 1921). Most of the design patent-unfair competition cases appear to be tried in New York and Chicago.

As pointed out above, the origin of the joinder of patent infringement and unfair competition causes of action is unclear. Nonetheless, until the advent of this case, all of the Circuits have held that the expiration of a design patent throws the construction into the public domain, the interest of the public in free competition being paramount. Characteristic of the attitude of the other Circuits is the latest statement of the Second Circuit, in *Hygienic Specialties Co.* v. *H. T. Saleman, Inc.*, 302 F. 2d 614, 619 (1962):

> "This initial response (intolerability of copying) to the problem has been curbed in deference to the greater public good, apparently on the principle that limitation is the lifeblood of competition." (Parenthetical remarks added)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

HORACE DAWSON
Attorney for Petitioner.

APPENDIX.

OPINION.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1962—SEPTEMBER SESSION, 1962

No. 13699
DAY-BRITE LIGHTING, INC.,
Plaintiff-Appellee,
v.
COMPCO CORPORATION,
Defendant-Appellant.

No. 13700
DAY-BRITE LIGHTING, INC.,
Plaintiff-Appellant,
v.
COMPCO CORPORATION,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

December 14, 1962

Before HASTINGS, *Chief Judge*, and KNOCH and CASTLE, *Circuit Judges*.

KNOCH, *Circuit Judge*. Plaintiff, Day-Brite Lighting, Inc., brought suit against defendant, Compco Corporation, for infringement of plaintiff's design patent and unfair competition.

The District Judge found that the patent was invalid and not infringed. He found the defendant was guilty of unfair competition, granted an injunction and ordered an accounting for damages. The defendant appealed this latter part of the judgment. The plaintiff cross-appealed the finding of invalidity and non-infringement of the patent.

The design of the patent concerns reflectors in commercial fluorescent lighting fixtures. The fixtures here involved are of the "uplight" type; 48 inches long; made of a housing, a ballast (transformer), a reflector, sockets and wiring for long lighting tubes; all sold, not in component parts but as a unit, ready for ceiling installation. The reflector, sandwiched, as indicated, between the housing and the light tubes, has elongated slots to allow light from the tubes to be directed upward against the ceiling as well as down toward the floor. The fixtures may be positioned end to end in a continuous line.

This type of fixture, popular in the early 1950's and marketed by a number of companies, including plaintiffs', used cross ribs between the elongated slots, the housings and over-all fixtures being similar in general appearance and size.

In 1954, after complaints of warpage in the reflectors, which caused the porcelain reflective coatings to chip, plaintiff altered its design by extending the cross ribs down the sides of the U-shaped reflector. Although this also presented an attractive appearance, it served to strengthen the reflector. The changed design was embodied in fixtures which the plaintiff began selling in or about October, 1954. These are sold under the name "C F I-10." The new appearance of the plaintiff's fixtures was the subject of its Patent No. Des. 176,367, issued December 13, 1955, which plaintiff sought to enforce in this action. Styling is considered important in the industry and such styling does provide product identification which increases salability of products.

In 1955, Mitchell Manufacturing Company manufactured fixtures with reflectors under the names "Mitchell" and "Dynalite," which were almost exact copies of plaintiff's

C F I-10 design. On or about December 31, 1955, the plaintiff gave notice of infringement to Cory Manufacturing Company, which had then acquired Mitchell Manufacturing Company and was advertising the reflectors. On or about March 9, 1956, defendant acquired certain of the Mitchell assets from Cory, and defendant then manufactured the Mitchell and Dynalite reflectors, using the same advertising and promotional literature put out by Mitchell and Cory.

On or about March 30, 1956, the plaintiff gave notice of infringement to the defendant. Defendant denied both infringement and the validity of the plaintiff's patent. Two of the plaintiff's other competitors who were offering reflectors having the overall appearance of C F I-10 entered into consent judgments holding the patent valid and infringed. Others discontinued manufacturing such reflectors on notice of infringement.

The District Judge held that plaintiff's patent was invalid. He specifically found that the function of the cross ribs was to strengthen against warp and twist, to minimize distortion due to the heat of the porcelain enameling process, and to prevent chipping of the finish after cooling; that the size, shape and length were dictated by the manufacturing process. He also found that had plaintiff's patent been valid, it would have been infringed by the defendant's reflectors.

The evidence of infringement presents no substantial issue. We cannot agree with the District Court that if the plaintiff's patent is valid, it is also infringed.

The evidence clearly indicates that the change of design as shown in the patent in suit arose out of a need to meet complaints of warping. While a choice of ribbing to meet the need was available, any particular choice had to be made from those types of ribbing which would be suitable to the functional requirement. The rib design had to be of a type to strengthen the reflector against warp and twist. The plaintiff's Manager of Tools and Dies, Bert A. Kaeppel, testified that the depth and shape of the ribbing

was dictated by production requirements. He stated that drawing the ribs "too deep" or making the side of the ribs "much more nearly parallel" would create a "problem of tearing the metal."

A design patent covering mere functional configuration does not meet the standard of invention for a design patent. *Spaulding* v. *Guardian Light Co.*, 7 Cir., 1959, 267 F. 2d 111, 113, cert. den. 361 U. S. 883; *Hopkins* v. *Waco Products, Inc.*, 7 Cir., 1953, 205 F. 2d 221, 224.

The District Court's decision that the design of the cross ribs was functional and dictated by the limitations of the manufacturing process is fully supported by the evidence. The Trial Judge also had before him prior art which had not been considered by the Patent Office. The Abernathy Mechanical patent (No. 2,332,770, October 26, 1943), the only reference cited, does not show cross ribs. The prior art reflectors listed by the Trial Judge in his Finding of Fact No. 7 do show transverse ribs. Thus the presumption of validity otherwise attaching to a patent was weakened here. *Senco Products, Inc.* v. *Fastener Corp.*, 7 Cir., 1959, 269 F. 2d 33, 34, cert. den. 361 U. S. 932 (1960); *Hobbs* v. *Wisconsin Power & Light Co.*, 7 Cir., 1957, 250 F. 2d 100, 105, cert. den. 356 U. S. 932.

It is the plaintiff's contention that the Trial Court decided the question of validity purely on the premise that certain individual elements in the design were old, and failed to consider the "over-all appearance" with its subtle changes and arrangements of old lines and shapes. We cannot agree.

In *Amerock Corporation* v. *Aubrey Hardware Mfg., Inc.*, 7 Cir., 1960, 275 F. 2d 346, Chief Judge Hastings examined the entire line of decisions in this Court respecting design patents. At page 348 of that opinion, he said:

> It is settled beyond dispute that "[a] design patent, in order to be valid, must disclose a design that is new, original and ornamental, unanticipated and inventive in character, and beyond the skill of the ordinary designer or draftsman." [Citing cases.]

We are satisfied that the District Court applied the proper criteria and correctly found that the design patent in suit was invalid.

This brings us to the question of unfair competition. While the District Judge did not specifically find "secondary meaning" identifying the reflectors with the plaintiff as a source, he did find that the appearance of the C F I-10 has the capacity to identify the plaintiff in the trade and does, in fact, so identify the plaintiff to the trade. He found that concurrent sale of C F I-10 and Mitchell-Dynalite fixture reflectors was likely to cause confusion in the trade, and that actual confusion had occurred. Therefore, although he dismissed the Complaint insofar as patent infringement was concerned, he did find the defendant guilty of unfair competition. He granted an injunction against unfair competition by sale or attempted sale of reflectors identical with or confusingly similar to the C F I-10 or the Mitchell "Dynalite," and ordered an accounting for damages resulting from such unfair competition.

Defendant contends that confusion of purchasers is impossible because those who buy this type of comparatively expensive produce (which is always shipped in clearly marked containers) are skilled, experienced and discriminating purchasers. However, the District Court did find confusion likely, and there is substantial evidence in the record to support that finding. We cannot characterize the finding as "clearly erroneous" and may not set it aside. Federal Rules of Civil Procedure, Rule 52.

The defendant argues that in the absence of a finding of either "secondary meaning" or "palming off," there can be no holding of unfair competition; that the essence of unfair competition is fraud. Defendant relies on statements in the opinion on petition for rehearing in *Day-Brite Lighting, Inc.* v. *Sandee Mfg. Co.*, 7 Cir., 1961, 286 F. 2d 596, 600, and similar expressions from this and other Circuits. In the *Sandee* case, the plaintiff in its petition for rehearing had sought clarification of the decision on the issue of unfair competition, the plaintiff having presumed

that this Court intended to affirm the District Court on the issue of unfair competition, while holding that the patent in suit was invalid and not infringed. In clarification, the opinion on the petition for rehearing stated:

> We realize, of course, that a case of unfair competition may be made, separate and apart from that of infringement. In this case, however, we think the two issues were so closely allied that the former could not prevail in the absence of the latter and that holding the patent invalid and not infringed also disposed of the action for unfair competition adversely to plaintiff.

The opinion on petition for rehearing then cites *Zangele & Peterson Co.* v. *Venice Furniture Novelty Mfg. Co.*, 7 Cir., 1943, 133 F. 2d 266, 269; *General Time Instrument Corp.* v. *United States Time Corp.*, 2 Cir., 1948, 165 F. 2d 853, 854; and *Sinko et al.* v. *Snow-Craggs Corp.*, 7 Cir., 1939, 105 F. 2d 450, to the effect mere copying of the teaching of an invalid patent does not constitute unfair competition. This *was* the law in Illinois. It is not contested that Illinois law governs the case before us.

However, there has been a change in the law of Illinois on this subject, as analyzed by Judge Duffy in his opinion in *Independent Nail & Packing Co. Inc.* v. *Stronghold Screw Products, Inc.*, 7 Cir., 1953, 205 F. 2d 921. After stating the rule promulgated in earlier cases, Judge Duffy continues (at page 925):

> However, we think the rule announced in these cases is no longer the law of Illinois.
>
> In 1942 the Supreme Court of Illinois in *Investors Syndicate of America, Inc.* v. *Edward J. Hughes, Secretary of State*, 378 Ill. 413, at page 422, 38 N. E. 2d 754, at page 759, stated, "Even in injunction cases between competing corporations the trend of decision is to place less emphasis on competition and more on confusion, as is evidenced by the following cases: (citing) 'The test should be whether the public is likely to be deceived'."

The defendant would limit the holding in *Independent Nail* to such "protectable" rights as trademarks. The plaintiff's reflectors, as found by the Trial Court, in findings supported by the evidence, do have the capacity to identify the plaintiff and do so identify the plaintiff in the trade. The capacity of the plaintiff's design to serve the plaintiff in somewhat the manner of a trademark does constitute a "protectable" right.

As noted, several choices of ribbing were apparently available to meet the functional needs of the product. The defendant did not avail itself of the other types but instead chose precisely the same design used by the plaintiff and followed it so closely as to make confusion likely. We are constrained to agree with Judge Duffy's statement in *Radio Shack Corp* v. *Radio Shack*, 7 Cir., 1950, 180 F. 2d 200, 206, as cited with approval so recently as November 21, 1962, in Judge Hastings' opinion in *G. Leblanc Corp.* v. *H. & A. Selmer, Inc.*, Appeal No. 13232-13233: The essence of "unfair competition" is that it be unfair, that "in all cases of unfair competition, it is principles of old-fashioned honesty which are controlling."

We have examined all the arguments advanced by both parties and have concluded that the judgment of the District Court must be affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago 10, Illinois

Friday, December 14, 1962

Before

Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

No. 13699

DAY-BRITE LIGHTING, INC.,
Plaintiff-Appellee,

v.

COMPCO CORPORATION,
Defendant-Appellant.

No. 13700

DAY-BRITE LIGHTING, INC.,
Plaintiff-Appellant,

v.

COMPCO CORPORATION,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago 10, Illinois

Friday, January 18, 1963

Before

Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

DAY-BRITE LIGHTING, INC.,
Plaintiff-Appellee,
(Cross-Appellant),
Nos. 13699-13700 vs.
COMPCO CORPORATION,
Defendant-Appellant.
(Cross-Appellee).

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that defendant-appellee's (Compco Corporation) petition for rehearing in the above-entitled matter, as well as petition for clarification, and petition for modification of decision of December 14, 1962, be, and the same are hereby DENIED.